

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
MICHAEL J. TALBOT, P.J., HAROLD HOOD AND HILDA R. GAGE, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOHN RODNEY MCRAE,

Defendant-Appellant

Supreme Court No. 121300

Court of Appeals No. 217052

Clare County Circuit Court No.
98-001151-FC

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

- I. Was Officer Dean Heintzelman a state actor at the time the Defendant made statements to him in the Clare County Jail?**

- II. Were Defendant's statements to Officer Heintzelman the result of the interaction of custody and official interrogation as discussed in *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990)?**

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Factual Background

For several years before 1987, the Defendant-Appellant, John McRae, lived south of Harrison, Michigan, in Clare County. His neighbor was Robert Dean Heintzelman, Sr. (24a-25a.) The two men were friends because they shared in community activities such as 4-H. (26-27a.) In late 1987, after 15-year-old boy in the community named Randy Laufer had disappeared without a trace, Defendant-Appellant left Harrison and the state of Michigan and moved with his family to Mesa, Arizona.

In 1997, Defendant-Appellant was arrested in Arizona on a Michigan warrant charging him with the murder of Randy Laufer. Shortly before that arrest, the body of Randy Laufer was accidentally discovered buried in the curtilage of the property previously lived on by Defendant-Appellant, John McRae. When the body was discovered, numerous sheriff's department employees, including reserve deputy Dean Heintzelman, guarded the scene. (56a, 66a.)

When Defendant-Appellant was arrested and extradited back to Michigan, he was held pending trial in the Clare County Jail. His son, Martin McRae, had also been arrested, charged with accessory after the fact to this murder, and brought back to Michigan. Charges against Martin McRae were later dismissed at the district court level.

Dean Heintzelman was, during the time that Defendant-Appellant was housed in the Clare County Jail, an unpaid, volunteer, reserve deputy with the Clare County Sheriff's Department. In such capacity, when he is active, he wears a sheriff's uniform. (24a.) Heintzelman described his duties as, "I go on transport, transport prisoners. We take care of ball games, do security at ball games. We help with visitation at the jail. That sort of stuff." (60a.) When Dean Heintzelman is not volunteering as a reserve deputy, his real occupation is as a self-employed heavy machine operator; he is the owner of D & K Excavating in Harrison, Michigan.

(60a.) Dean Heintzelman's mother also volunteered as a reserve deputy at the sheriff's department, and, on occasion, she controlled visitation for prisoners at the jail. (25a-26a.)

During the time that John McRae was awaiting trial, he was visited by his wife, Barbara. During one or more of the visits between Barbara McRae and Defendant-Appellant, he told her that he wished to have conversations with his old neighbors. (33a.) Barbara McRae conveyed the message from her husband to Dean Heintzelman's mother who was controlling visitation and Mrs. Heintzelman further conveyed the message to Dean that John McRae wished to have a visit from him. (26a.) Several days after receiving the invitation, on December 7, 1997, Dean Heintzelman decided to visit Defendant-Appellant at his jail cell. (62a-63a.) Earlier that evening, Heintzelman had transported prisoners for the sheriff. (64a.) Heintzelman had completed his assignment and thought to himself, "[W]ell, as long as I'm here at the jail, I'll go in and see John." (64a.) The time of the meeting was around 11:30 p.m. (64a.)

Dean Heintzelman was in the uniform of the sheriff's department at the time of his visit. He approached John McRae's jail cell and McRae rose from his cot to meet Heintzelman. They shook hands through the cell door bars and Defendant-Appellant McRae showed photographs of his family to Heintzelman and they discussed their families. (64a-65a.) Heintzelman then asked McRae, "John, did you – did you kill Randy Laufer?" McRae did not answer the question. (65a.) The two continued chatting "neighborly talk" (65a), until Heintzelman again asked, "John, did you have anything to do with this?" McRae responded, "It was bad, Dean. It was bad." (65a.) Immediately upon receiving this statement, Dean Heintzelman became so angry that he left the cell block without further conversation. (65a.)

Heintzelman's impression of the conversation was that he was there as an old neighbor and friend of John McRae and was not there in his capacity as a reserve deputy. (30a-31a.) Specifically, Heintzelman testified:

Q. Before you asked him those questions, did you give him what is commonly called the *Miranda* warnings?

A. There was no reason to. I mean, why? Why would I? I wasn't – it was just like if I had known you for years.

Q. You didn't feel at that point in time it was necessary that you explain to him that he had a right to remain silent or that he needed – that he had a right to have an attorney there if you were going to question him?

A. No, we was [sic] talking like friends, just like I'd be talking to you.

Q. So that was your view that you were asking –

A. Yeah.

Q. Questions about this case as a friend?

A. Yeah. Yeah, as a neighbor and everything, you know. (30a-31a).

Defendant-Appellant was convicted by the jury of premeditated first degree murder of Randy Laufer.

Procedural History

Defendant-Appellant was charged with first degree murder on October 13, 1997. Defendant-Appellant was arrested in Mesa, Arizona, and brought back to Michigan on the charges. Defense counsel was appointed for Defendant-Appellant and the matter was examined before the district court and bound over for trial on January 28, 1998. (2a.)

During the pendency of the preliminary examination, on December 17, 1997, Dean Heintzelman complied with Defendant-Appellant's request and visited with him at the jail.

The prosecution gave immediate but informal notice to the defense of the intent to use the statements made by Defendant-Appellant to Dean Heintzelman. After the bind over, this notice was formalized by a pleading filed by the prosecution on June 3, 1998, notifying Defendant-Appellant of the State's intent to use those statements against Defendant in trial. (6a-7a.)

Defendant objected to the use of said statements and a "*Walker*" hearing (*People v Walker*, 374 Mich 331; 132 NW2d 87 (1965)) was held before the circuit court on August 27, 1998. (23a, *et seq.*) At that hearing, Dean Heintzelman, John McRae, his wife Barbara McRae and a cellmate of McRae's, Kerry Kocsis testified. At that hearing, the trial court ruled that the statements were admissible. (52a-54a.) The testimony in controversy was allowed before the jury on December 10, 1998. (57a-71a.)

On December 11, 1998, Defendant-Appellant was convicted of first degree premeditated murder. On January 4, 1999, the trial judge imposed a mandatory sentence of life in prison. (72a.)

Defendant-Appellant appealed by right and on January 12, 2001, the Court of Appeals affirmed his conviction. (77a.)

Defendant-Appellant sought leave to appeal to this Court and on September 19, 2001, on order of this Court, the case was remanded to the Court of Appeals for reconsideration of Defendant's claim of error with regard to the testimony of witness Heintzelman concerning Defendant's alleged statement. (82a.)

On February 12, 2002, the Court of Appeals again issued an opinion (after remand) and affirmed the conviction after reconsideration as directed by this Court. In its opinion (after remand), the Court of Appeals held:

We conclude that the trial court did not clearly err in its findings, and that the court did not err in denying defendant's motion to suppress his statement. (87a.)

Defendant-Appellant again sought delayed leave to appeal from the second decision of the Court of Appeals and on June 19, 2003, this Court granted leave to appeal on the issue of the admissibility of the statements made by Defendant-Appellant to Dean Heintzelman.

ARGUMENT

- I. Dean Heintzelman was not a state actor when Defendant-Appellant made statements to him in the county jail. The fact that he wore a uniform as a reserve deputy did not make him a state actor as the only reason he was there was at the specific invitation of Defendant-Appellant to come and chat with him.**

A. Standard of Review

In determining the admissibility of a defendant's incriminating statements made while in custody, an appellate court conducts a *de novo* review of the entire record. However, an appellate court does not disturb the trial court's factual findings as to the voluntariness of the waiver of constitutional rights unless the trial court is found to be clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000).

B. Analysis

At the conclusion of the *Walker* hearing in this matter, where Defendant-Appellant testified, his wife Barbara McRae testified, a cellmate named Kocsis testified and Dean Heintzelman testified, the trial court recognized that one of the critical issues presented by this case was whether Dean Heintzelman was acting as a police officer during his meeting with Defendant-Appellant. The court found, and stated as its reasons:

Well, the issue for the Court as far the Court is concerned, is why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at the time, or was he back there at the request of the Defendant. He wanted to talk to him. The defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the police officer had to do.

Once the conversation is initiated by the Defendant, there's no necessity to advise him of any rights concerning the *Miranda* rules. So absent you being able to come up with some kind of law to the contrary, the Court's going to deny the motion in this situation to – in Limine to keep out the testimony of Mr. Heintzelman. (52a-53a).

Thus, the trial court specifically found that Dean Heintzelman was not in the Defendant's presence acting as a police officer. Rather, he was there in response to an invitation from the Defendant who wanted to talk to him.

Dean Heintzelman understood his role in the same light. He testified that he did not feel the need to give *Miranda* warnings because they were simply talking like old friends, "[a]s a neighbor and everything." (30a-31a.)

The People do not dispute that Defendant-Appellant was in full custody, had been arraigned on the charge of murder and had a court-appointed attorney acting on his behalf prior to his conversation with Dean Heintzelman. It is the position of People, however, that the mere fact that Dean Heintzelman wore the uniform of a sheriff's deputy did not make him a state actor at the time of his meeting with Defendant-Appellant.

In *Lacy v Arkansas*, 345 Ark 63; 44 SW3d 296 (2001), the defendant who was charged and arrested for murder exercised his Fifth Amendment right not to speak with detectives. He then demanded several times to speak with his mother. The defendant's mother was brought to him by the detectives and she repeatedly encouraged him to admit his responsibility for the crime and reveal to the detectives where the body of the victim was. After about 40 minutes of this, the defendant asked to have the detectives brought back to him. After detectives were brought back, defendant asked for an attorney and he was told that detectives were not certain they could bring one to him that late at night. After the detectives left to contact an attorney, defendant's mother again asked her son about the crime and where the victim's body was. The defendant again consented to meet with detectives and this time he confessed to the crime. The defendant was convicted, in part, based upon this confession. The defendant appealed, in part, on the basis that his mother had become an agent of the North Little Rock Police Department. The Arkansas Supreme Court rejected this argument. The court found that it was the defendant who

"repeatedly asked for his mother to be present." *Lacy v Arkansas, supra*, 44 SW3d at 304. The court noted:

Other jurisdictions have not seen fit to deny admission of a statement when a family member or friend has encouraged the suspect to talk after the suspect has invoked his or her right to counsel. *See, e.g., Arizona v. Mauro*, 481 U.S. 520; 107 S. Ct. 1931; 95 L. Ed. 2d 458 (1987). (suspect invoked right to counsel in murder of his son and wife asked to speak to suspect with the police present with a tape recorder;

* * *

Snethen v. Nix, 885 F.2d 456 (8th Cir. 1989) (suspect declined to speak to police without attorney present, but mother asked to speak to suspect who made incriminating statements in front of police; statement admissible since no evidence police questioned suspect;

* * *

U.S. ex rel Whitehead v. Page, 2000 U.S. Dist. LEXIS 5522, 2000 WL 343209 (N.D. Ill. 2000) (friend convinced suspect to confess to murder after he requested counsel; no evidence this was police-initiated interrogation; . . . *Lowe v. State*, 650 So. 2d 969 (Fla. 1995) (suspect confessed to girlfriend that he murdered victim after requesting counsel; police told girlfriend evidence against suspect; court affirmed admission of statement, holding no violation of *Rhode Island v. Innis, supra.*);

Lacy v Arkansas, supra, 44 SW3d 296 at 304.

Perhaps the case most strikingly on point with the situation presented in the instant case is *Cook v State of Georgia*, 270 Ga 820; 514 SE2d 657 (1999). In *Cook*, a young man committed a double murder. He was captured and held in jail and exercised his Fifth and Sixth Amendment rights while being held. The defendant's father, an active FBI agent, spoke with his son at the jail. At trial, certain admissions from the defendant to his father were introduced. Defendant was convicted and his appeal was based upon an argument that he was interrogated by his father after asserting Fifth and Sixth Amendment rights. Similar to the question posed by this Court, where Dean Heintzelman was a reserve sheriff's deputy while at the same time being an old friend and neighbor of Defendant-Appellant, the Georgia Supreme Court in *Cook* stated:

The difficulty in this case arises from the fact that John Cook was both an FBI agent and the suspect's father. 270 Ga 820 at 826.

The Georgia Supreme Court affirmed the conviction and the admission of evidence obtained by the father. In reaching this decision, the court examined numerous factors in trying to determine whether the FBI agent-father was acting as a state agent or was acting in a private capacity as the father of the suspect. The factors examined by the court in reaching its decision may be summarized as follows:

- Whether the questioner was a part of the investigative team in the case in question;
- Whether the questioner was directed by a superior to speak with the suspect;
- Whether the questioner acted solely out of concern for the welfare of the suspect;
- Whether the questioner was acting in the normal course of his or her duties when talking with the suspect; and
- Whether the interview involved typical police interrogation tactics and techniques.

Cook v Georgia, supra, 270 Ga at 827.

The factors examined by the Georgia Supreme Court in *Cook, supra*, were similar to and adapted from *United States v Gaddy*, 894 F2d 1307, 1309-1311 (CA11, 1990). In *Gaddy* the defendant was arrested for parole violation and was being investigated for a murder. The defendant exercised his Fifth Amendment privilege and had asked for counsel. The defendant's aunt was a police officer in the same jurisdiction that was holding the defendant. When advised that her nephew was being held, she met with her nephew at the jail and urged him to confess, which he subsequently did to detectives. The *Gaddy* court, examining very similar factors to those which were of import to the Georgia Supreme Court in *Cook*, found that there was no violation of the principles established by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) [Fifth Amendment privilege], or *Edwards v Arizona*, 451 US 477; 101 S Ct 1880;

68 L Ed 2d 378 (1981) [Sixth Amendment privilege] because the aunt, even though employed as a police officer, did not act as an agent of the government but . . . as a private citizen. *Gaddy* at 1311.

Applying these factors to the encounter between Dean Heintzelman and Defendant-Appellant McRae leads to the conclusion that Dean Heintzelman was not acting on behalf of the state during the meeting.

First, there is no evidence that Dean Heintzelman had any investigative responsibilities with respect to John McRae's case. The record demonstrates that when the body of Randy Laufer was discovered, Dean Heintzelman, along with numerous other sheriff's deputies, guarded the scene for a period of time until the Michigan State Police forensic evidence experts could arrive and examine the evidence. Defendant-Appellant failed to present any evidence at either the pretrial *Walker* hearing or at the trial itself that Mr. Heintzelman had any responsibilities in the investigation of this case. When Dean Heintzelman was questioned as to what he does as a reserve officer, his testimony showed no investigative responsibilities.

Second, as the trial court found, Dean Heintzelman was "back there at the request of the Defendant." (52a.) There has been no showing that Dean Heintzelman was sent to interrogate the Defendant or that anyone associated with the prosecution even knew about the meeting between Dean Heintzelman and Defendant-Appellant McRae until after it had occurred.

Third, what were Dean Heintzelman's concerns at the time of this meeting? As stated by the Court of Appeals:

Nor does the record support defendant's contention that Heintzelman used his friendship with defendant to elicit an incriminating statement or that Heintzelman was seeking information at the behest of investigating officers. On the contrary, the evidence supported the trial court's finding that Heintzelman visited defendant at defendant's request. Although the testimony differed regarding the point in the conversation at which Heintzelman inquired about defendant's involvement in the charged offense, Heintzelman, Kocis and defendant all testified that the

conversation included talk of their families and defendant's son, thus suggesting the social aspect of the visit, as Heintzelman testified. . . . (Court of Appeals Opinion, Appendix 86a-87a).

The fourth factor is whether the questioner was acting in the normal course of his duties when he contacted the suspect. The record is uncontradicted here that Dean Heintzelman had finished his assigned responsibilities of transporting prisoners earlier that evening. Heintzelman's duties as a reserve officer did not include any investigative responsibilities. In fact, as a reserve officer, Dean Heintzelman is not recognized as either a police officer or a law enforcement officer under Michigan law. MCL 28.602(k) provides:

"Police officer" or "law enforcement officer" means, unless the context requires otherwise, any of the following:

- (i) a regularly employed member of a police force or other organization of a city, county, township, or village, of the state, or of a state university or community college who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state. Police officer or law enforcement officer does not include a person serving solely because he or she occupies any other office or position.

Dean Heintzelman was not regularly employed; he was irregularly employed. His regular employment was as the owner and operator of an excavating company. His description of his duties demonstrated that he was not responsible for the prevention and detection of crime or the enforcement of the general laws of the state, but rather was responsible for such miscellaneous sheriff responsibilities as crowd control on the 4th of July or security at baseball games. Finally, as found by the trial court, Heintzelman was "back there" not because he was a police officer on police duties at the time, but because the Defendant wanted to talk to him. (52a.) As best stated by Heintzelman himself when asked whether he read *Miranda* to the Defendant-Appellant:

There was no reason to. I mean, why? Why would I? I wasn't – it was just like if I had known you for years.

* * *

No, we was [sic] talking like friends, just like I'd be talking to you.

* * *

Yeah, as a neighbor and everything, you know. (30a-31a).

Fifth, the interview did not follow standard police protocol. The two spoke of family and the Defendant showed photographs of his son's wife and his grandchild. (28a.) What most clearly demonstrates that Heintzelman was not acting on behalf of the state as a police investigator, and that this was not a typical interrogation, is that when the Defendant made his inculpatory statement, Heintzelman became so furious that he stalked out of the jail area rather than pursue the opening presented by Defendant-Appellant. When a police interrogator finally breaks through the defendant's resistance to talking about the crime, he or she doesn't walk out in anger but rather vigorously pursues that lead. Here, Heintzelman behaved exactly as what he was, an old friend who felt betrayed and disgusted by an admission from the Defendant-Appellant that he might have been involved in the crime.

Dean Heintzelman was back in the cell block talking with John McRae on December 17, 1997, not because he was a volunteer reserve officer with the sheriff's department, but solely because he was an old friend and neighbor of the Defendant-Appellant who had been specifically invited by name to come have a chat with him. McRae argues before this Court that the mere wearing of a sheriff's uniform at the time of that meeting made Dean Heintzelman an actor on behalf of the state and part of the investigation team. There is no factual support for this allegation. The Defendant-Appellant was fully aware that his old friend was dressed in the uniform of a sheriff's deputy. This would have been immediately apparent yet the Defendant-

Appellant shook hands with Heintzelman through the bars of the cell and proceeded to have the chat for which he invited Heintzelman. There is no evidence that at any time the Defendant-Appellant tried to terminate his meeting with Dean Heintzelman. On the contrary, it was Heintzelman who stormed out of the jail cell after the Defendant's inculpatory statement. Dean Heintzelman testified that he did not feel it necessary to read *Miranda* warnings to the Defendant because he felt he was meeting with him as an old neighbor. Defendant-Appellant's behavior during that meeting reveals that he felt the same about Heintzelman's status during that encounter.

Dean Heintzelman was not a state actor during his meeting with Defendant-Appellant in the Clare County Jail.

II. Though Defendant-Appellant was in custody during his meeting with Dean Heintzelman, their conversation was not an official interrogation and Defendant-Appellant was not subject to the type of coercive pressures that were at issue in *Miranda v Arizona*, 384 US 436 (1966) or *Illinois v Perkins*, 496 US 292 (1990).

A. Standard of Review

The admissibility of a confession is determined by whether it was voluntarily given. *Colorado v Connelly*, 479 US 157; 107 S Ct 515; 93 L Ed 2d 473 (1986). In determining whether a confession was voluntary, the court will take into consideration the totality of the circumstances surrounding the confession to determine that the confession is the product of an essentially free and unconstrained choice by its maker or whether the accused's will was overborne and his capacity for self-determination critically impaired. *People v Cipriano*, 431 Mich 315 at 333-334; 429 NW2d 781 (1988).

B. Analysis

This Court has directed that one of the issues to be considered in this appeal is, "Whether defendant's statements to officer Heintzelman constituted the interaction of custody and official interrogation, as discussed in *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990)." In *Illinois v Perkins*, the police placed an undercover police officer in a cell block with the defendant who was held on charges unrelated to a murder that the police officer was investigating. The police officer and a cooperating inmate engaged the defendant in conversations to see if he said anything incriminating about the murder. The defendant, believing that he was merely casually conversing with two other inmates, bragged to them about the murder under investigation. That conversation was utilized in obtaining a conviction of the defendant. The appeal was premised on an argument that the nature of the investigation violated the defendant's Fifth Amendment rights because he had not been given *Miranda* warnings before he was interrogated by an undercover officer. The Supreme Court examined the circumstances surrounding the making of the statements by the suspect to determine whether there was a "police-dominated atmosphere." 496 US at 296. The court stated:

We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. 496 US at 297

The court ruled in *Perkins* that because the suspect was freely and voluntarily speaking with a person whom he believed to be a fellow inmate, none of the coercive pressures that would lead a suspect to feel compelled to speak by fear of reprisal or in the hope of more lenient treatment should he confess were present. 496 US at 296-297.

The Court further indicated that it might consider extending this reasoning to a situation which would encompass the meeting between Defendant-Appellant here and Dean Heintzelman. The Court stated at 496 US 299:

Where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced. (The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here). (emphasis added).

The Court in *Perkins* made it clear that its decision was founded on the Fifth Amendment as the defendant's Sixth Amendment rights had not vested in that case.

The seminal case for determining a violation of Sixth Amendment rights is *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), where the Court held in now famous language:

[w]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (emphasis added). 451 US at 484-485.

Thus, if Defendant-Appellant here is to prove a constitutional violation, he must do so on the basis of the Fifth Amendment as discussed in *Illinois v Perkins*, as it is unequivocal in this record that Defendant-Appellant himself initiated, by invitation, the contact with Dean Heintzelman.

The Supreme Court in *Perkins, supra*, repeatedly referred back to its decision in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). As the Court stated:

It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. 496 US at 297.

The encounter between Dean Heintzelman and Defendant-Appellant was not an official interrogation. The Supreme Court in *Rhode Island v Innis*, 446 US 291, 298-299; 100 S Ct 1682; 64 L Ed 2d 297 (1980) defined custodial interrogation as:

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

* * *

We do not, however, construe the *Miranda* opinions so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subject the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. (emphasis added).

The Court then discussed other police practices which included trickery and psychological pressure on the suspect designed to overpower his resistance to self-incrimination and declared that such practices equally constituted "interrogation." *Id.*

Here, there is no evidence to support a claim that Dean Heintzelman conducted an official interrogation. The trial court made a specific finding of fact that Dean Heintzelman was present with the Defendant-Appellant because of the invitation issued by Defendant-Appellant. There is neither any indication nor evidence that Dean Heintzelman was instructed to seek information from Defendant-Appellant by his police superiors or by the prosecution. There is no evidence, other than the bare fact that Dean Heintzelman was wearing the uniform of a law enforcement officer, that any form of pressure, however subtle, was exerted upon Defendant-Appellant to compel him to speak against his interest. There was no coercive atmosphere surrounding the contact between Defendant-Appellant and Dean Heintzelman. As noted by the Court of Appeals below, in its decision after remand:

Although the testimony differed regarding the point in the conversation at which Heintzelman inquired about Defendant's involvement in the charged offense, Heintzelman, Kocsis, and Defendant all testified that the conversation included talk of their families and the Defendant's son, thus suggesting the social aspect of the visit, as Heintzelman testified. In short, the record is void of any suggestion of the type of police coercion against which *Miranda* was intended to protect. . . . (87a.)

In addition to the "social atmosphere" recognized by the Court of Appeals, the record is clear that Dean Heintzelman did not pressure the Defendant to answer any questions. There were no threats and no inducements offered to Defendant-Appellant. Defendant-Appellant already knew that his son had been arrested simultaneously with him in Mesa, Arizona, and had been charged as an accessory after the crime. Therefore, Heintzelman mentioning this fact created no new pressures on Defendant-Appellant.

Heintzelman asked, "did you do it" twice during the meeting. The first time he was asked, Defendant simply did not respond to the question. McRae took no steps to terminate the meeting or to advise Heintzelman that he did not wish to be questioned on that topic. Some time later during the meeting, Heintzelman again asked essentially the same question and this time received the response that became evidence in the trial. As previously noted, upon receiving the response from McRae that has created this issue, Dean Heintzelman immediately terminated the meeting and left the jail cell area. Had this been an "official interrogation," Dean Heintzelman would certainly have continued to pursue the newly developed evidence.

Defendant-Appellant McRae cites numerous cases in his argument that the Sixth Amendment prohibited an interrogation without the presence of his court-assigned attorney. Defendant's arguments and his authority are unpersuasive here. This is because there was no interrogation. Moreover, the prevailing rule on the Sixth Amendment is that there is no violation

when the defendant initiates the renewed contact with the state. Here, as previously noted, the record is uncontradicted that Defendant-Appellant initiated this contact.

Defendant-Appellant McRae further argues that the record does not support he initiated the contact. As stated at page 18 of his brief, Defendant-Appellant McRae says, "Rather, it was his wife who asked Heintzelman's mother to have Heintzelman visit him."

It is clear that McRae initiated the contact, using his wife as an agent to invite Dean Heintzelman to come for a visit. On this point, the trial court specifically made a finding of fact that it was Defendant's invitation which initiated this contact. Such findings of fact are only disturbed on appellate review if they are found to be clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983) and *People v Walker (on rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Although Defendant-Appellant McRae argues that the test is not who initiates the conversation, but rather who initiates the interrogation or discussion about the alleged offense, (Defendant-Appellant Brief on Appeal, p 19), none of the cases he cites support this proposition. The cases cited refer back to the original language of *Edwards v Arizona*, *supra*, that the defendant must initiate further communication and that is precisely what happened here; John McRae invited Dean Heintzelman to come to him at the jail to chat with him. McRae never indicated to Heintzelman that the invitation had a limited purpose or that portions of the conversation were "out-of-bounds." The Supreme Court has said that the *Miranda* safeguards include the right to cut off questioning, the power to control the time of the questioning, the subjects discussed, and the duration of the interrogation. *Michigan v Mosley*, 423 US 96, 103; 96 S Ct 321; 46 L Ed 2d 313 (1975). Defendant-Appellant had those powers here but made no attempt to exercise any of them. He certainly did not limit the topics available for conversation with his old neighbor Dean.

CONCLUSION

The People have shown to this Court that Dean Heintzelman was not a state actor during his meeting with John McRae in the jail of Clare County. Because of this, the second inquiry is effectively moot as there can be no official interrogation where the questioning is not done by an agent of the government. *Colorado v Connelly, supra*, at 166. Even if this Court were to conclude that Dean Heintzelman acted on behalf of the state, there was no coercion or atmosphere of compulsion created in that contact that would give rise to the consideration involved in *Illinois v Perkins*. The nature of the communication was clearly such that it was a social contact initiated by Defendant-Appellant McRae, not a police inquiry initiated by the government.

The fact that Defendant-Appellant McRae had previously asserted his Fifth and Sixth Amendment rights is not the determinative factor in this examination. As stated by the United States Court in *Edwards v Arizona*, 451 US at 490:

It is not unusual for a person in custody who has previously expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. . . ."

Confessions are a proper element in law enforcement. Any statement given freely and voluntarily without compelling influences is admissible in evidence. *Miranda v Arizona, supra*, at 478. This Court quoted with approval the United States Supreme Court in *Colorado v Connelly, supra* at 166:

Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relative evidence. (citations omitted).

We have previously cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries. . . ." (emphasis omitted). We abide by that counsel now. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" (citation omitted), and while we have

previously held that exclusion of evidence may be necessary to protect constitutional guarantees, both the necessity for the collateral inquiry and the exclusion of evidence deflect a criminal trial from its basic purpose. *People v Cipriano, supra*, at 333.

Nothing in the record here supports a conclusion that Defendant-Appellant was in any way coerced into answering questions from his old friend and neighbor Dean Heintzelman. This conversation was just what it appears to be and what it was found to be by the lower courts; a conversation of a social nature initiated by John McRae. The trial court and the Court of Appeals were correct in upholding the conviction of John McRae for the brutal, torture-murder of a 15-year-old boy. The evidence of his statements to Dean Heintzelman was validly obtained and highly probative and was properly allowed by the trial court.

RELIEF SOUGHT

The People, Plaintiff-Appellee herein respectfully that this Court affirm the conviction of John McRae, Defendant-Appellant, and allow him to serve the remainder of the term to which he was sentenced.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'M. Blumer', with a stylized, flowing script.

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